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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1987

MICHAEL HUGHES, NANCY OWEN, and
COLES COUNTY,

Cross-Petitioners,

-vs-

JAMES R. OHSE,

Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. Whether the Court of Appeals of the Seventh Circuit has applied the provisions of the First and Fourteenth Amendment to the United States Constitution in a manner directly in conflict with the decision of the United States Supreme Court in Connick v. Myers.

TABLE OF CONTENTS

Questions Presented..... 1

Table of Contents..... 2

Table of Authorities..... 4

Opinions Below..... 6

Jurisdiction..... 6

Constitutional Provisions and Statutes Involved..... 7

Statement of the Case..... 9

Argument..... 15

Conclusion..... 29

Appendix (provided under separate cover but contains the following documents):

Amended Opinion of the United States Court of Appeals for the Seventh Circuit dated April 15, 1987.....APP-1

Judgment on Oral Argument of United States Court of Appeals for the Seventh Circuit dated April 15, 1987.....APP-24

Order of United States Court of Appeals for the Seventh Circuit denying Petition for Rehearing.....APP- 26

Judgment of United States District Court for the Central District of Illinois dated September 26, 1985.....APP- 28

Order of United States District Court for the Central District of Illinois dated October 28, 1985 denying Plaintiff's Motion to Alter Judgment.....APP- 71

Excerpts of Deposition of Respondent, James R. Ohse.....APP- 77

TABLE OF AUTHORITIES

Cases:	Page
Connick v. Myers, 461 U.S. 138, 103 Supreme Court 1684, 75 L Ed 2d 708 (1983).....	16, 17, 20-26, 28-30
Pickering v. Board of Education, 391 U.S. 563, 88 Supreme Court 1731 (1968), 20 L. Ed. 2d 811.....	16, 17, 19, 28, 29, 30
Patkus v. Sangamon-Cass Consortium, 769 F. 2d 1251 (7th Circ. 1985).....	18, 19, 23
Constitutional Provisions:	
U.S. Constitution Amendment I....	7
U.S. Constitution Amendment XIV..	8
Statutory Provisions:	
42 U.S.C. Section 1983.....	9
Jurisdictional Statutes:	
28 U.S.C. Section 1254(1).....	7
28 U.S.C. Sections 1331, 1343, 2201, 2202.....	14

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The Cross-Petitioners, MICHAEL HUGHES, NANCY OWEN and COLES COUNTY, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-captioned proceeding on April 15, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 816 F. 2d 1144 (7th Circ. 1987), and is reprinted in the Appendix hereto at APP-1.

The opinion and order of the United States District Court for the Central District of Illinois granting Cross-Petitioners' Motions for Summary Judgment is unreported. It is reprinted in the Appendix at APP-28. The opinion of the District Court denying Respondent's, JAMES R. OHSE, Motion to Alter Judgment is unreported. It is reprinted in the Appendix at APP-71.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit which Cross-Petitioners request this Court to review was entered April 15, 1987.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sect. 1254(1) and Supreme Court Rule 19.5. Respondent James R. Ohse filed a Petition for Writ of Certiorari to the United States Supreme Court with attached "Appendix", Docket Number 87-5269 which was docketed on August 10, 1987. The Petition for Writ Of Certiorari was received by counsel for Cross-Petitoners on August 7, 1987 and jurisdiction of the Court is sought pursuant to Supreme Court Rule 19.5. The parties of record in 87-5279 are James R. Oshe, Petitioner vs. Michael Hughes, Nancy Owen, William J. Sunderman, Joseph R. Spitz, and Paul C. Komada, Respondents.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides in Section 1 as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, libery, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Sect. 1983. Civil action for deprivation of rights: Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On December 12, 1977 James Ohse was appointed adult probation officer in an

office headed by Michael L. Hughes, Chief adult and juvenile probation officer for Coles and Cumberland County, Illinois. In late 1980 or early 1981 friction developed between Ohse and Hughes. The friction was prompted in part by the promotion of a fellow employee, Vicki Starwalt, to the position of Chief Deputy Probation Officer. By the spring of 1981 Ohse and Hughes spoke to each other only when necessary. APP-2. In April of 1982 Hughes approached Ohse about complaints he had received regarding Ohse. In May 1982 the situation degenerated to a point where Hughes and Ohse had a confrontation at a staff meeting which was marked by name calling. APP-2. On May 24, 1982 Ohse conversed with a fellow employee and a deputy sheriff about allegedly improper conduct occurring at the Coles/Cumberland Probation office. APP-2. At the staff

meeting Hughes admitted the incidents of drinking on the job by several staff members and the falsifying of mileage reports. APP- 2 . Hughes stated "...we'll all start fresh, we'll all start anew from this point." Hughes Deposition page 35. APP- 3 . Hughes revised the office policy manual and wrote Chief Circuit Judge Ralph Pearman indicating he intended to abide strictly by the rules therein. APP- 3 . On June 25 or 26, 1982, Hughes evaluated Ohse's work. Ohse was rated as "adequate" to "exceptional". APP- 3 . On June 29, 1982, Ohse and Hughes again had a confrontation. APP- 33 .

On August 11, 1982 Ohse complained about the evaluation in a Memorandum to Hughes.

On November 23, 1982 Ohse filed a seventeen page grievance with Hughes.

The grievance detailed their tumultuous personal history and questioned the veracity of Hughes' claim that he had received complaints about Ohse from employees at the State's Attorney's office. No issues of public concern were raised. Hughes responded to the grievance by meeting with three of the Defendants in this case; Circuit Judge Spitz, Sunderman and Komada. Hughes asked the Judges what he should do. They replied Hughes' evaluation was acceptable and nothing further need be done. Thereafter, on December 2, 1982 Hughes told Ohse his grievance had lacked merit. On December 11, 1982 Ohse sent his written grievance to Judge Pearman. On December 22, 1982 Ohse sent a Memorandum addressed "To Whom it May Concern" to Pearman, the three Defendant Judges and certain County Board members in the Coles County State's

Attorney's office. The letter alleged the improper conduct in the Hughes headed probation office. Ohse's letter called for an investigation and the filing of criminal charges. APP- 4 .

Judge Baker found the only accusations which rise to the level of public concern are the inappropriate mileage charges and other possible misuse of county materials and time. He further found the improper mileage charges were exposed and the practice ended by Hughes several months prior to Ohse's letter to the Judges. APP- 62 .

On December 27, 1982 Defendant, Nancy Owen, State's Attorney for Coles County, informed Ohse by letter that criminal charges would not be filed against Hughes. On the next day, December 28, 1982, Judge Pearman informed Hughes that he believed Hughes' defenses to the Ohse allegations

were sufficient and nothing further would be done. On January 3, 1983 Hughes suspended Ohse and also requested Ohse's termination, alleging various acts of insubordination. On January 6, 1983, Judge Pearman appointed Defendant Judges, Sunderman, Spitz and Komada to investigate Hughes' request to terminate Ohse. A hearing was held on February 1, 1983. On February 2, 1983 a decision was issued terminating Ohse. APP-____.

On March 16, 1983 Ohse filed the Instant 42 U.S.C. Sect. 1983 action in the United States District Court for the Central District of Illinois. His Complaint alleged among other things that he had been fired in violation of his 14th Amendment Right to Free Speech. Jurisdiction was invoked pursuant to 28 U.S.C. Sect. 1331, 1343, 2201 and 2202. The United State District Court granted

Summary Judgment to each of the Defendants on September 26, 1985 and denied the Petitioner's Motion to Alter Judgment on October 28, 1985.

Petitioner appealed to the Court of Appeals for the Seventh Circuit, and the Court decided to remand the case to the District Court for decisions of fact concerning Ohse's claim based upon a denial of free speech under the 14th and 1st Amendments of the United States Constitution. The Court also decided that the three Defendant Judges would be dismissed from the lawsuit for the reason that they enjoy absolute judicial immunity. APP- 22 . Ohse filed a Motion for Rehearing and it was denied on May 14, 1987. APP- 26 .

ARGUMENT

This Cross-Petition for Writ of Certiorari is premised on the fact that

the Seventh Circuit Court of Appeals has sorely misapplied the United State Supreme Court decision in Connick v. Myers, 461 U.S. 138 (1983). Connick provides a further extension of the principles laid down by the U.S. Supreme Court in Pickering v. Board of Education, 391 U.S. 563 (1968). Pickering set forth a two pronged analysis to determine whether certain speech of a public employee is constitutionally protected under the First and Fourteenth Amendments to the United States Constitution. The first step in the analysis is to determine whether the speech is "a matter of legitimate public concern" upon which "free and open debate is vital to informed decision-making by the electorate" 391 U.S. at 571-572. The second task of the Court is to strike a "balance between the interests of the [employee], as a citizen, in commenting

upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering at 568, Connick v. Myers, 461 U.S. 138, 142. The mission of the U.S. Supreme Court in Connick was to further define the mechanics in applying this balancing test. The Seventh Circuit's application of the balancing test in the present case is directly in conflict with the detailed analysis set forth in Connick.

The first factor to consider in the Pickering balance test is the interest of the public employee, as a citizen, in commenting upon matters of public concern. In other words, it is not sufficient in considering the public employee's interests as a public employee in speaking of matters of public concern. We are to

look at the public employee from his status as a citizen of these United States and not simply as a person employed by government. It appears that this distinction was not considered by the Seventh Circuit Court of Appeals. This becomes very apparent when looking to the factors the Court considered in the analysis. Those factors were stated as follows:

> "(1) whether the speech impeded the employee's ability to perform her responsibilities; (2) the importance of close working relationships with superiors and co-workers; (3) the time, place, and manner in which the speech was delivered; and (4) the context in which the underlying dispute arose." APP-12.

These are all very important factors. However, they are not dispositive. The Seventh Circuit's failure to look at Ohse 'as a citizen' becomes apparent from that Court's prior decision in Patkus v. Sangamon-Cass Consortium, 769 F. 2d 1251 (1985). Therein, the Seventh Circuit

listed several factors that need to be considered in the Pickering balancing test. One of the factors listed in that case is "whether the speaker should be regarded simply as a member of the general public". Patkus at 1258. There is nothing in the Seventh Circuit Court's opinion in the present case which would indicate that Ohse was being viewed as a citizen and not simply as a public employee. Had the Seventh Circuit considered that factor, they would surely have reached a different result; for Ohse's statements came at such a time when a regular citizen would have little interest. As stated by Judge Harold Baker in his Order of September 26, 1985 the improper practices "were exposed and the practice ended by Hughes several months prior to Ohse's letter to the Judges." APP-62. Ohse's interest in speaking of

the alleged improprieties of Hughes and/or his staff were legitimate during the time that those improprieties were being practiced. However, once the conduct had been corrected, Ohse's interest as a citizen in seeing that they were corrected no longer existed. A citizen has a legitimate interest in correcting unfavorable conduct by public officials. However, once that conduct has been corrected, that interest no longer exists.

One of the factors listed by the Seventh Circuit in approaching the balancing test was the context in which the underlying dispute arose. APP-12. This is listed as an important consideration in Connick. 461 U.S. at 153. Although the Seventh Circuit mentioned the context in which Hughes suspended Ohse, there is nothing to indicate that the context of Ohse's speech was

considered. In its opinion, the Seventh Circuit stated as follows:

> "Interestingly, it was only six days after Judge Pearman informed Hughes that his defenses to the Ohse allegations were adequate that Hughes suspended Ohse, triggering the process that would lead to Ohse's termination." APP-15.

Isn't it of equal interest that Ohse's letter to Judge Pearman came only after both his prior objection to his personnel evaluation and the denial of his personal grievance. The context in which Ohse's 'To Whom It May Concern' letter was written is extremely important for the Court to consider. That letter was not written by Ohse as a concerned citizen. It was written by a disgruntled employee who was unhappy with his evaluation and his subsequent failure to have that evaluation revised.

In considering the context in which Ohse's letter was written, the reasoning of the Supreme Court in Connick logically

applies. Therein, it is stated as follows:

"We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absence the most unusual circumstances, a Federal Court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." 461 U.S. at 147.

Although the matters addressed in the letter, when considered in a vacuum, may be deemed to be of public concern, the context in which they are raised is an important consideration. The importance of this is emphasized in Connick. Therein, the Supreme Court stated as follows:

"Finally, the context in which the dispute arose is also significant. This is not a case where an employee, out of purely academic interests, circulated a questionnaire so as to obtain useful research. Myers acknowledges that it is no coincidence that the questionnaire followed upon the heels of the transfer notice." 461 U.S. at 153.

In the present case, it is no coincidence that the letter from Ohse

was written and delivered only after unfavorable personnel decisions were made toward him. This is not a case where an employee, as a concerned citizen, wants to curb abuses in a public office. As stated earlier, this is a case where an employee has seized an opportunity to slash out at his supervisor. Ohse's statements in the letter had no other purpose.

The identical reasoning set forth above applies to another factor considered important in Connick but ignored by the Seventh Circuit in their decision in Ohse. The time, place and manner in which the speech was delivered is a relevant concern. Connick at 152-153. The importance of the timing of the statement is further emphasized by the Seventh Circuit in its earlier decision of Patkus v. Sangamon-Cass Consortium, 769 F. 2d 1251, 1258 (1985). There is no question

that the statements contained in Ohse's letter were made at a time when no legitimate purpose could be served thereby. The misconduct of which Ohse was complaining had already been corrected. APP- 62 . Just as it was relevant in Connick to consider that the speech in question "emerged after a persistent dispute between Myers and Connick and his deputies over office transfer policy" 461 U.S. at 154, so is it relevant in the present case that Ohse's letter emerged after a persistent dispute between Ohse and Hughes over his evaluation. As stated by Judge Baker: "When put into the context of the chronology of events beginning in 1981, the charges against Hughes are revealed as an extension of Ohse's grievance about his evaluation and possibly his unhappiness at Vicki Starwalt's promotion." APP- 62 .

The Seventh Circuit failed to consider the timing and manner of Ohse's speech as important factors in the balancing test. It was only concluded that the particular matters brought up by Ohse were matters of public concern. That is only the first part of determining whether speech is protected. The Seventh Circuit merely adopted their prior conclusion that the letter addressed issues of public concern as conclusive to the first part of the balancing test. Ohse's interest, as a citizen, was not analyzed whatsoever. Had the important factors listed above entered into the equation, the Seventh Circuit would clearly have reached a different result. The failure of the Seventh Circuit to consider these factors is in direct conflict with the Supreme Court's decision in Connick.

After evaluating the interest of the employee, as a citizen, it is then time to look at the State's interest in promoting the efficiency of its services. Connick at 142. We need go no further than the Seventh Circuit's opinion. Therein it is stated:

> "The 'to whom it may concern' letter may have disrupted the office, undermined Hughes' authority, and hindered close working relationships in a manner which may best be described as inevitable..." APP-15.

It is acknowledged, therefore, that Ohse's letter had a disruptive influence on the efficient fulfillment of the probation department's responsibilities to the public.

There can be no question that Ohse's letter served to further alienate any possible relationship he might have with his supervisor, Hughes. It is also clear that the letter served to strain the relationship between Ohse and his fellow

employees. Although the Seventh Circuit stated that there was no evidence that Ohse could not get along with a large majority of his fellow employees, APP-17, the contrary is true. Including Ohse and Hughes, there were six probation officers in Coles/Cumberland County. APP-79. Ohse admitted that none of the other probation officers would speak to him. APP-78. Since none of the other employees of a very small office had talked to him this conclusion by the Seventh Circuit has no factual basis. What can be concluded is that Ohse had put up a large barrier between himself and all other employees in the Coles/Cumberland County probation office. Ohse's letter, therefore, served to disrupt the workings of the government's office. As this Court is most likely aware, probation officers often have to work together on cases.

With such a barrier between Ohse and everyone else, the office could not run efficiently.

The decision of the Seventh Circuit sorely misapplies the principle set down in Connick v. Myers. As stated in Connick, it is not necessary "for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." 461 U.S. at 152. The Seventh Circuit failed to heed to "the common sense realization that government offices could not function if every employment decision became a constitutional matter". 461 U.S. at 143. In short, the Seventh Circuit failed to properly conduct the Pickering balance test as that test was defined in Connick v. Myers. Had it done so, the decision clearly would be that Ohse's speech was not constitutionally protected.

CONCLUSION

Had Ohse written his To Whom It May Concern letter prior to filing his personal grievance, prior to the denial of his personal grievance, or prior to objecting to his personnel evaluation, Ohse would be speaking as a citizen on a matter of public concern. At the time Ohse raised his complaints, the alleged objectional activities had stopped. Ohse was speaking for personal gain; not to communicate First Amendement speech as a citizen. This subtle distinction between speaking as an employee on a personal matter and as a citizen on a matter of public concern is a theme raised in Pickering v. Board of Education and emphasized in Connick v. Myers. This theme was overlooked by the Seventh Circuit and resulted in the misapplication of the Pickering and Connick decisions.

The Seventh Circuit has departed from the precedent of this Court and its own decisions in improperly applying the Pickering and Connick decisions. In so deciding the Seventh Circuit has placed an undue burden upon public employers and has made it impossible for public employers to efficiently and fairly discharge their duties.

This Court should exercise its authority here to assure that the balancing test of Pickering v. Board of Education, supra, and the holdings of Connick v. Myers, supra, are applied correctly.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted
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APPENDIX

TABLE OF CONTENTS

Page

Amended Opinion of the United States Court of Appeals for the Seventh Circuit dated April 15, 1987 . . . . . APP-1

Judgment on Oral Argument of United States Court of Appeals for the Seventh Circuit dated April 15, 1987 . . . . . APP-24

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Order of United States Court of Appeals for the Seventh Circuit denying Petition for Rehearing. APP-26

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Order of United States District Court for the Central District of Illinois dated October 28, 1985 denying Plaintiff's Motion to Alter Judgment. APP-71

Excerpts of Deposition of Respondent, James R. Ohse. . . . APP-77

In the

United States Court of Appeals

For the Seventh Circuit

No. 85-3074

JAMES R. OHSE,

Plaintiff-Appellant,

v.

MICHAEL HUGHES, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois.
No. 83-2061—**Harold A. Baker,** *Judge.*

ARGUED MAY 16, 1986—DECIDED APRIL 1, 1987

Before CUDAHY and FLAUM, *Circuit Judges,* and CAMPBELL, *Senior District Judge.**

CAMPBELL, *Senior District Judge.* Plaintiff-appellant James Ohse appeals the dismissal of his action brought in the United States District Court for the Central District of Illinois. Ohse claims he was wrongfully terminated from his position as an Illinois Adult Probation Officer and that the termination violated various rights which he was entitled to under the United States and Illinois Constitutions and Illinois state law. Seven individuals and entities are named as defendants in this action. Included are

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* The Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.

the Illinois Counties of Coles and Cumberland, Chief Probation Officer Michael Hughes, State's Attorney Nancy Owen, and Illinois Circuit Judges William Sunderman, Joseph Spitz and Paul Komada. The district court had jurisdiction over several counts in this suit pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343. Pendent jurisdiction was exercised over the state claims. Cross-motions for summary judgment were filed. The district court granted defendants' motion for summary judgment as to all the federal claims. Thereafter, pursuant to *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) and *Venson v. Cody*, 761 F.2d 335 (7th Cir. 1985) the pendent state law claims were dismissed as well.

Factual Background

The relevant facts are as follows. On December 12, 1977 James Ohse was appointed as an Adult Probation Officer in an office headed by Michael L. Hughes, Chief Adult and Juvenile Probation Officer for Coles and Cumberland Counties, Illinois. In either late 1980 or early 1981 friction developed between Ohse and Hughes. There is some testimony that the friction was prompted in part by the promotion of a fellow employee, Vickie Starwalt, to the position of Deputy Chief Probation Officer. In any event, by the spring of 1981 Ohse and Hughes spoke to each other only when necessary.

In April of 1982 Hughes approached Ohse about complaints he had received regarding Ohse. By May, 1982, the situation degenerated to the point where Hughes and Ohse had a confrontation at a staff meeting which was marked by name calling. On May 24, Ohse countered by conversing with two fellow employees about illegal and improper conduct at the Coles-Cumberland Probation Office. Ohse informed them that there had been alcohol consumed during business hours in the office by Hughes and others. Ohse also revealed that Hughes had directed employees to report meal expenses as mileage expenses for reimbursement purposes. The next day Hughes held a staff meeting and admitted the incidents of drinking on the job and the falsifying of mileage reports. Hughes

stated, ". . . we'll all start fresh, we'll all start anew from this point." (See Hughes Deposition at p. 35). Soon thereafter Hughes revised the office policy manual and wrote a letter to Chief Circuit Judge Ralph Pearman indicating he intended to abide strictly by the rules therein. The Circuit Court has supervisory authority over the probation office, including the power to hire and fire personnel, pursuant to Ill. Rev. Stat. ch. 38, §§ 204-1 *et seq.* (see *infra.*).

In June, 1982, Hughes had the opportunity to evaluate Ohse's work performance. Ohse was rated as "adequate" to "exceptional." On August 11, Ohse complained about the evaluation in a memorandum to Hughes. Ohse especially wanted to know why he had been rated only "adequate" in certain areas.[1]

On November 23, Ohse filed a 17 page grievance with Hughes pursuant to the established office grievance procedure. The grievance detailed their tumultuous personal history and questioned the veracity of Hughes' claim that he had received complaints about Ohse from employees at the State's Attorney's Office. Hughes responded to Ohse's grievance by meeting with three of the defendants in this case: Circuit Judges Spitz, Sunderman and Komada. Hughes asked the judges what he should do. They replied Hughes' evaluations were acceptable and nothing further need be done. Thereafter, on December 2, 1982, Hughes told Ohse his grievance lacked merit. On December 11, a dissatisfied Ohse took his grievance to Judge Pearman. Thereafter, on December 22, Ohse sent a memorandum addressed "To Whom It May Concern" to Pearman, the three defendant judges, selected County Board members and the Coles County State's Attorney's Office. The letter alleged the following improper conduct from the Hughes-headed probation office: 1) misuse of mileage vouchers to cover meal expenses; 2) abuse of sick and vacation time;

[1] We note Ohse claims Hughes told him, prior to the evaluation, that he had received complaints about Ohse from employees of the State's Attorney's Office. Ohse asserts he questioned those employees and they all denied ever complaining to Hughes.

3) misappropriation of money budgeted for office expenses; 4) abuse of authority concerning Hughes' obtaining of a hospital's records for personal use; 5) miscellaneous other violations such as the allowing of employees to sleep on the job and secretaries to do personal typing during business hours. Ohse's letter called for an investigation and the filing of criminal charges.

On December 27, defendant Nancy Owen, State's Attorney for Coles County, informed Ohse by letter that criminal charges would not be filed against Hughes. On the next day, December 28, Judge Pearman informed Hughes that he believed Hughes' defenses to the Ohse allegations were sufficient and that nothing further would be done. On January 3, 1983 Hughes suspended Ohse. He also requested Ohse's termination, alleging various acts of insubordination.[2] On January 6, Judge Pearman appointed defendant Judges Sunderman, Spitz and Komada to investigate Hughes' request to terminate Ohse. A hearing was held on February 1. On February 2, a written decision was issued terminating Ohse.

On March 16, 1983, Ohse filed the instant action in the district court. The district court broke down his various claims into four areas. First, Ohse alleged his termination violated his due process rights under the Fourteenth Amendment of the United States Constitution. He claimed he was deprived of property and liberty interests due to the manner in which he was terminated. Second, Ohse claimed his discharge violated his First Amendment rights to freedom of expression under the United States Constitution. Third, Ohse claimed he was denied his right to equal protection under the Fourteenth Amendment. Finally, Ohse asserted various claims under the Illinois Constitution and Illinois law. We shall discuss each claim as presented above.

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[2] This procedure is pursuant to the statutory scheme found at Ill. Rev. Stat. ch. 38, § 204-5 (see *infra*).

I—*Due Process Claims*

A. *Property Interest Claim*

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972) is the seminal case setting forth the current analysis to employ when ascertaining if a person has a property interest in a public sector employment position. In *Roth*, the Court recognized the now longstanding principle that a person may have a sufficient interest or expectation in a government benefit (see *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970)) or a position of public employment (see *Slochower v. Board of Education*, 350 U.S. 551, 76 S.Ct. 637 (1956)) to be deemed to have a property interest in that position safeguarded by the due process clause of the Fourteenth Amendment. When such a situation arises, summary termination or separation of the person from that interest is unconstitutional. Instead, a hearing or inquiry into the merits behind the proposed termination is necessary to meet Fourteenth Amendment due process requirements. This hearing ensures the person is separated from the entitlement only for good cause. When good cause is demonstrated by a separate and fair hearing, a person is deemed to have received all the process that he or she is due. In ascertaining whether a property interest attaches to a particular situation the *Roth* court stated:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. . . . Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

92 S.Ct. at 2709.

Indeed, in *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074 (1976) the Court declared:

> A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law. (Footnotes omitted).

96 S.Ct. at 2077.

Turning to Illinois law, did Ohse have a legitimate claim of entitlement to his position as an Adult Probation Officer which would create a property interest as described above? We answer in the negative. In *Levin v. Civl Service Commission of Cook County*, 52 Ill.2d 516, 288 N.E.2d 97 (1972), the Supreme Court of Illinois explicitly stated:

> As to the status of a public employee, this court has held that a person has no property right in public employment. (People ex rel. Atkin v. Kipley, 171 Ill. 44, 77, 49 N.E. 229; People ex rel. Atkin v. Loeffler, 175 Ill. 585, 606, 51 N.E. 785; Elder v. Mall, 350 Ill. 538, 542, 183 N.E. 578). This court has likewise held that a public employee has no property right in public employment which falls within the protection of the due-process clause of either the State or Federal constitution. Pickus v. Board of Education, 9 Ill.2d 599, 606, 138 N.E.2d 532; Jordan v. Metropolitan Sanitary Dist., 15 Ill.2d 369, 155 N.E.2d 297.

288 N.E.2d at 100.

We also note the language of Ill. Rev. Stat. ch. 38, § 204-1 which stated in pertinent part during the relevant time pertaining to this lawsuit:

> The circuit court of each of the several counties in this State may appoint a probation officer to act as such for and throughout the county to which he shall be appointed. The circuit court of any county may appoint such number of additional probation officers for such county as the court may deem to be necessary or advisable. Any circuit court may also, in its discretion appoint a chief probation officer, deputy

> chief probation officers, and supervisors, in addition to the number of probation officers appointed. . . . *The probation officers* shall serve as such from the date of their appointment, *shall be subject to the orders of the courts appointing them, and removable in the discretion thereof* by an order duly entered of record. (Emphasis added).[3]

Ohse claims Ill. Rev. Stat. Chapter 38, § 204-5 mandates that he only be fired "if good cause existed for his termination." (Ohse brief, p. 10). Section 204-5 reads in pertinent part:

> Any Chief Probation Officer shall have authority to suspend any Probation Officer under his supervision for a period of not exceeding thirty (30) days, but may not discharge, and it shall be the duty of such Chief Probation Officer promptly to file charges against any Probation Officer so suspended by him, with the Court or Judges appointing such Probation Officer, and said Court or Judges shall thereupon investigate said charges and may hear evidence, and *shall act thereon as the interest of justice and the good of the probation service may require.* (Emphasis added).

We find Ohse's argument unpersuasive. The language of *Levin* explicitly rejects any notion that public employees in Illinois are presumed to have a property interest in

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[3] Section 204-1 has been repealed, effective January 1, 1986. Ill. Rev. Stat. ch. 38, Section 204-5 (*infra*) has been amended and rewritten effective January 1, 1986, however there is no indication this section should be applied retroactively to fit Ohse's situation. [See *Union Pacific Railway Company v. Laramie Stockyards Company*, 231 U.S. 190, 199, 34 S.Ct. 101, 102 (1913), "the first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislation.' " (quoting *United States v. Heth*, 7 U.S. 239 (3 Cranch 399), 2 L.Ed. 483 (1806)) (quoted in *Greene v. United States*, 376 U.S. 149, 160, 84 S.Ct. 615, 621 (1964))].

their positions. Further, the language in section 204-1 *supra* clearly states probation officers serve at the discretion of the state circuit court. As Ohse himself points out in his brief, the rules of statutory construction dictate that words in a statute be given their plain and ordinary meaning. (Ohse Brief, p. 9). By invoking this rule of construction this court is lead to the inescapable conclusion that section 204-1 and *Levin* clearly indicate that Ohse had no property interest in his position at the probation office. Ohse's reading of section 204-5 as mandating his termination be for good cause only is (arguably) a reasonable interpretation, but not necessarily the only interpretation to be had from the language of the section.[4] Since the plain and explicit language of section 204-1 allows removal of Ohse at court discretion, we are unwilling to usurp the plain meaning of that language with Ohse's interpretation of section 204-5.

The Illinois Personnel Code at Ill. Rev. Stat. ch. 127, § 63b104a & c is supportive of this ruling. While recognizing Ill. Rev. Stat. ch. 127, § 63b1086.16 requires certain state employees be fired only for cause and only after notice and prior hearing, we note § 63b104a & c lists certain groups of employees as exempt from such treatment. "Employees of the courts" are included among the exempt groups.[5] Undoubtedly Ohse is an employee of the court,

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[4] Indeed one could argue a situation could arise where a person could be fired without cause because "the interest of justice and the good of probation service" requires such a move, although we do not mean to suggest we find this argument any more persuasive.

[5] Ill. Rev. Stat. ch. 127, § 63b104a reads in pertinent part:

> Definition of jurisdictions. There are hereby created three separate areas of personnel jurisdiction of the Department of Central Management Services, as follows:
>
> (1) Jurisdiction A, with respect to the classification and compensation of positions in the State service.
>
> (2) Jurisdiction B, with respect to the positions in the State service to which persons must hold appointments on a basis of merit and fitness.

(Footnote continued on following page)

as the district court concluded. This point also nullifies Ohse's argument under Article VI, Section 18(b) of the Illinois Constitution for Ohse must consider himself to be a judicial officer of the Circuit Court in his position as Adult Probation Officer.[6]

We have considered Ohse's miscellaneous other arguments as to why he had a property interest in his position and find them unpersuasive. Even assuming *arguendo* that Ohse had a property interest in the instant case, we close our discussion in this section by wondering aloud where a due process violation could be considered to have occurred? Indeed, conspicuously absent from the arguments of both sides in this case is the fact that Ohse did receive a February 1, 1983 hearing before three (now defendant) judges of the state circuit court prior to his discharge. At this hearing Ohse was represented by aggressive counsel who filed several motions. Ohse was also allowed to testify and present documentation and cross-examine witnesses. All this occurred at a hearing held several months after Ohse had initiated a grievance against Hughes pursuant to a delineated procedure and had distributed a letter to the circuit judges, selected county board members and the state's attorney's office outlining the issues we discuss here today. Hence the judges presiding at the February 1 hearing cannot be said

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[5] *continued*

(3) Jurisdiction C, with respect to conditions of employment in State service.

Ill. Rev. Stat. ch. 127, § 63b104c reads in pertinent part:

General exemption. The following positions in State service shall be exempt from jurisdictions A, B, and C, unless such jurisdictions shall be extended as provided in this Act:

(3) Judges and officers and employees of the courts, and notaries public.

[6] Article VI, Section 18(b) of the Illinois Constitution states:

"The General Assembly shall provide by law for the election, or the appointment by Circuit Judges, or clerks and other non-judicial officers of the Circuit Courts and for their terms of office and removal for cause."

to have been ill-informed or unprepared to make a ruling on the matter. The impression Ohse leaves is that anything less than a jury trial is insufficient—assuming *arguendo* he has a property interest in his position in the first place. Certainly Ohse has no constitutional entitlement to a jury trial in this situation.

B. *Liberty Interest Claim*

Ohse asserts there is an issue as to whether his termination deprived him of a liberty interest under the Fourteenth Amendment. We disagree. In order to establish a deprivation of a liberty interest, a plaintiff must advance evidence that the State seriously damaged his standing and associations in the community through allegations of, for example, dishonesty or immorality. *Roth*, 92 S.Ct. at 2707. The resulting effect should be of sufficient severity that the plaintiff has trouble finding other employment opportunities. *Id.*[7] Ultimately, an individual must be deemed to be deprived of ". . . the right . . . to contract . . . (or) engage in any of the common occupations of life. . . ." *Id.*

No doubt Ohse suffered some degree of negative stigmatization from his discharge but that is inevitable in any discharge and does not necessarily amount to a constitutional deprivation. As we stated in *Lipp v. Board of Education of City of Chicago*, 470 F.2d 802, 805 (7th Cir. 1972):

> . . . not every remark which may arguably affect one's reputation violates due process if made by a government official without a hearing, for the four-

[7] In *Munson v. Friske*, 754 F.2d 683, 693 (7th Cir. 1985) we summarized *Roth*'s teachings as follows:

> In interpreting the Supreme Court's holding in *Roth*, this court has held that a liberty interest is implicated when either (1) the individual's good name, reputation, honor or integrity are at stake by such charges as immorality, dishonesty, alcoholism, disloyalty, Communism or subversive acts; or (2) the state imposes a stigma or other disability on the individual which forecloses other opportunities.

> teenth amendment protects only against charges that 'might seriously damage [one's] standing and associations in his community'.

(Citing *Roth*, 92 S.Ct. at 2707) (Cited with approval in *Hadley v. County of DuPage*, 715 F.2d 1238, 1245 (7th Cir. 1983)).

In *Munson* we concluded:

> A liberty interest is not implicated where the charges merely result in reduced economic returns and diminished prestige, but not permanent exclusion from or protracted interruption of employment.

Id. at 693 (citing *Stretten v. Wadsworth*, 537 F.2d 361, 366 (7th Cir. 1976)).

We do not believe Ohse has alleged any persuasive facts which would lead us to conclude a liberty interest deprivation occurred here. Ohse admits he found employment after his termination (Ohse Dep., Doc. 66, pp. 24-25). Further, no significant evidence is advanced by Ohse that his discharge seriously damaged his associations or reputation in the community. Indeed, the evidence suggests otherwise. Subsequent to his discharge at the probation office Ohse, while employed, apparently pursued a masters degree in business administration at a reputable state university. The district court correctly dismissed Ohse's liberty interest claims.

II—*First Amendment Claim*

Ohse's First Amendment claim presents more perplexing questions. The criteria to employ here are well established by three cases: *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968); *Connick v. Myers*, 461 U.S. 139 (1983) and *Knapp v. Whitaker*, 757 F.2d 827 (7th Cir. 1985) (Coffey, J.). *Pickering* teaches us that to determine whether Ohse's speech was constitutionally protected we must employ a two step analysis. First, we must decide whether Ohse's speech "is a matter of public concern" in which "debate is vital to informed decision-making by the electorate." *Pickering*, 88 S.Ct. at 1736.

The district court ruled the speech was of public concern and we see no reason to reach a different conclusion. After all, Ohse detailed serious abuses in a publicly funded probation office which were later admitted by the chief of the office to be true. Ohse revealed the drinking of alcohol by probation employees during business hours, the falsifying of mileage charges to cover meal expenses, the inappropriate taking of sick and vacation days, situations where Hughes misappropriated public funds for unauthorized uses, and members of the office sleeping on the job. It is clear to us, as it was to the district court, that the above matters are of public concern which would trigger "debate . . . vital to an informed decision-making electorate." *Id.* Having determined the speech of public concern, the next step, according to *Pickering*, is to employ a balancing test best described by Judge Coffey in *Knapp*:

> If the speech is deemed a matter of public concern, the court must then engage in the *Pickering* balancing test, weighing the interest of the public employee, as a citizen, in commenting upon matters of public concern with the interest of the State, as an employer, in promoting effective and efficient public service.

757 F.2d at 839.

Several factors should be considered in this analysis, such as:

> (1) whether the speech impeded the employee's ability to perform her responsibilities; (2) the importance of close working relationships with superiors and coworkers; (3) the time, place, and manner in which the speech was delivered; and (4) the context in which the underlying dispute arose.

Id.

Ultimately, however, the *Pickering* court recognized that:

> Because of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their supervisors, against whom the statements are directed to furnish grounds for

> dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.

88 S.Ct. at 1734-35.

At this point, for purposes of comparison and perspective we turn to the fact patterns and analysis surrounding the *Connick* and *Knapp* cases. In *Connick* the allegedly aggrieved employee was named Sheila Myers. Myers held a position as an Assistant District Attorney. Upset over her proposed transfer to another office she spoke to one of her superiors about the matter. Unsatisfied with the results, she prepared an office questionnaire and then distributed it in-house to 15 Assistant District Attorneys. The questionnaire asked the staff its opinion on the office transfer policy, office morale, the desirability of creating a grievance committee, the degree of confidence in the supervisory staff, and whether it was felt there was pressure to work on the political campaigns of office supported candidates. District Attorney Harry Connick, Myers' boss, considered the questionnaire an act of insubordination and discharged Myers. Myers concluded the questionnaire triggered her termination and therefore abridged her First Amendment right to speak freely. Connick claimed the termination was because Myers refused to accept the transfer. The Supreme Court rejected Myers' argument, reversing the rulings of the lower tribunals. It reasoned:

> Myers' questionnaire touched upon matters of public concern in only a most limited sense; her survey, in our view, is most accurately characterized as an employee grievance concerning internal office policy. The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Myers' discharge therefore did not offend the First Amendment.

103 S.Ct. at 1693-94.

The *Connick* Court continued:

> In this case, with but one exception, the questions posed by Myers to her co-workers do not fall under

> the rubric of matters of "public concern." We view the questions pertaining to the confidence and trust that Myers' co-workers possess in various supervisors, the level of office morale, and the need for a grievance committee as mere extensions of Myers' dispute over her transfer to another section of the criminal court. Unlike the dissent, *post*, at 1698, we do not believe these questions are of public import in evaluating the performance of the District Attorney as an elected official. *Myers did not seek to inform the public that the District Attorney's Office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases. Nor did Myers seek to bring to light actual or potential wrongdoings or breach of public trust on the part of Connick and others.* Indeed, the questionnaire, if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo. While discipline and morale in the workplace are related to an agency's efficient performance of its duties, the focus of Myers' questions is not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors. These questions reflect one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause célébre. (Emphasis added).

103 S.Ct. at 1690-1691.

In the case at bar, we disagree with the district court that *Connick* compels us to reach the conclusion that Ohse's speech was unprotected. We are of the opinion that Ohse's "To Whom It May Concern" letter, distributed to various figures in positions of public trust, was more focused upon issues of public concern than Myers' in-house office questionnaire. The *Connick* Court found only one of Myers' questions of public concern. This cannot be compared to the several questions of public concern raised by Ohse. Further, Ohse's actions were not as disruptive to the management of his office as Myers' questions/actions were to hers. The Hughes abuses delineated by Ohse

were probably generally recognized by a significant percentage of the office personnel (if not all personnel). Additionally, Myers' questionnaire was distributed in-house and doubted the integrity and competence of the supervisory staff in general. Ohse's grievances were taken out of the office and attacked only Hughes' performance as office leader. The "To Whom It May Concern" letter may have disrupted the office, undermined Hughes' authority, and hindered close working relationships in a manner which may best be described as inevitable; however, we believe that the matters the letter addressed were of high public concern and that Ohse was entitled to raise these important issues as he did.

Interestingly, it was only six days after Judge Pearman informed Hughes that his defenses to the Ohse allegations were adequate that Hughes suspended Ohse, triggering the process that would lead to Ohse's termination.[8] Before this event, Hughes had rated Ohse's professional competence as "adequate" to "exceptional." In sum, in this case we conclude Ohse's interest as a citizen in commenting on these matters of public concern outweighs the State's interest in promoting an efficient and effective working environment. The *Pickering* balancing test weighs toward Ohse's interests and therefore we rule his speech was constitutionally protected, reversing the district court here.[9]

---

[8] Arguably it was less than six days since one of those six days was New Year's Day and therefore not a working day.

[9] To this extent we reject the district court's ruling that *Connick* overrules *Atcherson v. Siebenmann*, 605 F.2d 2058 (8th Cir. 1979). *Atcherson* concerns a situation factually similar to the case at bar. Esther Atcherson was a probation officer who had strained relations with her boss. Eventually she wrote a letter to Judge Siebenmann stating that if it was her integrity that was at issue, she'd like to reveal some facts about her boss's conduct. She then alleged the office regularly engaged in improper expense reimbursement procedures such as the falsification of mileage expenses to cover other expenses. Soon thereafter, Atcherson was forced to resign. The Eighth Circuit ruled the termination was wrongful and in violation of her First Amendment right to free speech. We agree and note we distinguish *Atcherson* from *Connick* using the same reasoning to distinguish Ohse's case from *Connick* above.

The facts of the *Knapp* case closely parallel those in the case at bar, although they are not as similar as the facts of *Atcherson*. In *Knapp* this court affirmed the district court ruling that plaintiff Knapp's speech on certain issues was constitutionally protected. This enabled Terry Knapp, a school teacher, to take his case to the jury, which ultimately granted him an award for damages. Yet it can hardly be comfortably concluded that Knapp's speech was less disruptive to the school system that employed him than Ohse's speech was to his probation office. The *Knapp* court summarized:

> The record indicates that Knapp contacted School Board members concerning his classroom assignment; the content of administrative assistant Hatton's evaluations; the inequitable mileage allowance for Woodruff coaches; the liability insurance provided by Peoria School District No. 150 for coaches and volunteer parents who transport student-athletes to school-related activities; and the general ineffectiveness of the grievance procedure within District 150.

757 F.2d at 840.

The record also indicates Knapp consistently avoided following established grievance procedures and chains of command while contacting the School Board. Indeed, Knapp delivered an 11 page statement to the Board (not unlike the Ohse "To Whom It May Concern" letter) describing his school's policies and actions. Even Knapp's union representative called at least one of Knapp's five grievances without merit. School principal Russell McDavid labeled this conduct disruptive and insubordinate, not unlike as Hughes has done in the instant case.

Not all of Knapp's issues of concern were deemed of public concern by the court. However, when the *Pickering* balancing test was employed by the *Knapp* court, Knapp's interests were deemed to have priority. Not insignificantly, the *Knapp* court stated:

> The initial, and often determinative, question is whether the speech interferes with the employee's work or

> with the efficient and successful operation of the office. Knapp's speech clearly did not interfere with his teaching responsibilities, as Knapp continued to teach in the science department at Woodruff High School for more than a year after he spoke with the School Board members.

757 F.2d at 842.

We are unconvinced there is sufficient evidence to conclude at this point that Ohse's speech interfered with his responsibilities at the probation office. Several reasons compel such a conclusion. First, before the "To Whom It May Concern" letter, even Hughes rated Ohse's performance "adequate" to "exceptional." Secondly, no significant concrete examples of professional incompetence are ever advanced by Hughes. Thirdly, there is no evidence that Ohse was unable to get along with an unusually large number of fellow employees at the office. The only disruptive result of Ohse's speech and conduct from the evidence advanced is the degenerative effect it had on the already volatile Hughes-Ohse relationship. That is not sufficient to separate the case from *Knapp*, where the plaintiff was allowed to proceed to trial.

In sum, Ohse's speech addressed matters of public concern by unearthing breaches of the public trust. The issues of public concern raised by Ohse were of equal import compared to those found in *Knapp* and greater in number than those found in *Connick*. Hence we conclude that Ohse's speech was constitutionally protected as a matter of law.

Yet Ohse is still not out of the woods. We must vacate and remand this case back to the district court. As we stated in *Knapp*:

> The initial issue is one of law, whether the plaintiff's speech is constitutionally protected. . . . If this burden is satisfied, the next question is one of fact, whether the constitutionally protected speech was a substantial or motivating factor in the defendant's actions. If this second burden is satisfied, the third

> question is also one of fact, whether the defendant defeated the plaintiff's claim by demonstrating that he would have reached the same decision in the absence of the plaintiff's constitutionally protected speech. (Footnotes omitted).

757 F.2d at 827.

Therefore, in order to decide these questions of fact, we believe a remand is appropriate.

III—*Equal Protection Claim*

Ohse claims he was denied equal protection of the laws because other state employees are assured evidentiary hearings before their termination. We reject this contention.

Ohse's attack on the Illinois law that draws a distinction between any process probation officers and other state employees may receive before termination is without merit. Under the traditional equal protection analysis the distinction must have a rational relation to a legitimate state interest. We believe the distinction meets this test. The State could rationally conclude that probation officers are in a position of trust and confidence with the court that justifies discretionary removal. Of course, this recognition of a probation officer's sensitive relationship with the judiciary should not be read to necessarily preclude an individual's First Amendment right to speak freely on issues of public concern, an issue which *Pickering* teaches us should be examined on a case by case basis. We see no constitutional violation in the distinction given to probation office positions.

Miscellaneous

In this section we address two final matters. The first is Ohse's argument that the defendant judges do not enjoy absolute immunity in this case. Ohse claims the judges served in an executive as opposed to judicial capacity and therefore are entitled to only good faith immunity and

capable of being sued in this case. The district court did not address this issue and therefore on a remand, Ohse believes his counts against the judges should be considered. We disagree and rule the three defendant judges are to be dismissed from this lawsuit as a matter of law.

In *Forrester v. White*, 792 F.2d 647 (7th Cir. 1986) we reflected upon the fact that for several hundred years a judge's judicial "acts" or rulings from the bench on matters within his jurisdiction are entitled to absolute judicial immunity. See 792 F.2d at 650-651, dissent at 660-661. Similarly, in *McMillan v. Svetanoff*, 793 F.2d 149 (7th Cir. 1986) we elaborated that:

> It is well established that judges are immune from liability for their judicial acts, even when they act maliciously or corruptly. *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). The purpose of judicial immunity is to protect the public's interest in an independent judiciary. The doctrine of judicial immunity was initially developed in the context of adversarial proceedings where judges decide controversies between parties. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347, 20 L.Ed. 646 (1871). It has since been extended to any "judicial" act performed by a judge and even to other officials acting in a manner closely aligned with the judicial process. *Barr v. Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959); *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978); *Mother Goose Nursery Schools, Inc. v. Sendak*, 770 F.2d 668 (7th Cir. 1985), certiorari denied, ____ U.S. ____, 106 S.Ct. 884, 88 L.Ed.2d 919 (1986).
>
> The rationale for a doctrine that excludes judges from liability for even intentional and malicious conduct while on the bench is that judges should be free to make controversial decisions and act upon their convictions without fear of personal liability. *Stump*, 435 U.S. at 364, 98 S.Ct. at 1108. It is the concern for principled and fearless decisionmaking that forms the basis for judicial immunity. *Pierson v. Ray*, 386 U.S.

> 547, 554, 87 S.Ct. 1213, 1217, 18 L.Ed.2d 288 (1967). But immunity is only granted when essential to protect the integrity of the judicial process. *Briscoe v. LaHue*, 460 U.S. 325, 334-335, 103 S.Ct. 1108, 1115, 1116, 75 L.Ed.2d 96 (1983).
>
> Courts are hesitant and cautious in applying the judicial immunity doctrine to areas outside the traditional adversarial process, such as to quasi-judicial acts. See *Malley v. Briggs*, ____ U.S. ____, 106 S.Ct. 1092, 1096-1098 (1986). In order for quasi-judicial officials to be granted absolute judicial immunity, their acts must reflect the essence of judicial decision-making and involve discretion of a judicial nature. See *id.*, 106 S.Ct. at 1097; *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976); *Clark v. Washington*, 366 F.2d 678 (9th Cir. 1966). Accordingly, only in the most extraordinary cases are executives shielded from damages liability. See *Cleavinger v. Saxner*, ____ U.S. ____, 106 S.Ct. 496, 501, 88 L.Ed.2d 507 (1985) (citing favorably *Saxner v. Benson*, 727 F.2d at 669, 674 n.2 (Cudahy, J., concurring)). We must be equally hesitant in applying the doctrine to judges acting outside the traditional dispute resolution function.

793 F.2d at 150-51.

Surely, the defendant judges in the instant case were involved in a "judicial act" in which they should feel free to render decisions without fear of personal liability. Ohse's hearing had all the elements of a judicial proceeding—counsel was present, witnesses were cross-examined and documentary evidence was received. Importantly, the judges had no personal or professional interaction with Ohse other than when Ohse initiated the interaction through his own letters addressed to them and, of course, through the hearing. Any interaction by the judges with Hughes concerning Ohse was also done in a judicial manner and can only be considered as judicial in nature. Ohse's argument that the judges were serving in an executive, as opposed to judicial capacity, simply misses the point. As

the Supreme Court stated in *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894 (1978).

> Judges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities. This point is underlined by the fact that prosecutors—themselves members of the Executive Branch—are also absolutely immune.

98 S.Ct. at 2913.

Of course, supportive authority for our ruling here today also comes from *Pierson v. Ray*, 386 U.S. 547, 97 S.Ct. 1213 (1967). In *Pierson* a municipal police officer had presided over a criminal case under Mississippi law which resulted in 15 defendants being given sentences of four months in jail and fines of $200. On appeal the County Court reversed the convictions and the cases were dropped. Subsequent to this, the defendants turned petitioners by filing a § 1983 action against the municipal police justice in the United States District Court for the Southern District of Mississippi. The petition asked for damages based on false arrest and imprisonment. The Supreme Court stated:

> We find no difficulty in agreeing with the Court of Appeals that Judge Spencer is immune from liability for damages for his role in these convictions. The record is barren of any proof or specific allegation that Judge Spencer played any role in these arrests and convictions other than to adjudge petitioners guilty when their cases came before his court. Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley v. Fisher*, 13 Wall. 335, 20 L.Ed. 646 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public,

> whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." (*Scott v. Stansfield*, L.R. 3 Ex. 220, 223 (1868), quoted in *Bradley v. Fisher, supra*, 349, note, at 350.) It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.
>
> We do not believe that this settled principle of law was abolished by § 1983, which makes liable "every person" who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. Accordingly, this Court held in *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), that immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine.

87 S.Ct. at 1217-1218 (Footnotes and citations omitted).

In sum, for reasons articulated above, we find the role played by the three defendant judges in this action unmistakably judicial in nature and within their jurisdiction. Therefore, we rule the three defendant judges are to be dismissed from the lawsuit.[10]

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[10] Ohse's cite to *Atcherson v. Siebenmann, supra* as supportive authority is without merit. The *Atcherson* court did not rule, as Ohse suggests, that judges in a position as we find them in the

(Footnote continued on following page)

Finally, we note Ohse has pleaded state law claims which were never addressed by the district court after it dismissed all the federal claims. On remand, these claims should be addressed accordingly.

IT IS SO ORDERED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[10] *continued*

case at bar do not enjoy absolute immunity. Rather, the *Atcherson* court ducked the question stating:

> Assuming without deciding that Judge Siebenmann acted as an administrator and not in his judicial capacity, we hold that he established a qualified immunity defense to damages liability.[8]

Footnote number 8 reads:

> Because of our disposition of the qualified immunity issue, we do not reach Judge Siebenmann's argument that his conduct in terminating Atcherson's employment was cloaked in absolute judicial immunity.

Therefore *Atcherson* does not bolster Ohse's argument here and, more generally, Ohse fails to persuade us there is any significant case law on point supportive of his position.

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JUDGMENT - ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

April 15, 1987

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. WILLIAM J. CAMPBELL, Senior
District Judge*

JAMES R. OHSE,	)Appeal from the
	)United States
Plaintiff-Appellant,	)District Court for
	)the Central District
No. 85-3074 vs.	)of Illinois,
	)Danville Division
MICHAEL HUGHES, et al.,	)
	)No. 83 C 2061
Defendants-Appellees.	)HAROLD A. BAKER,
	Judge

This cause was heard on the record from the United States District Court for the Central District of Illinois, Danville Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judg-

ment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED IN PART, REVERSED AND REMANDED IN PART, in accordance with the amended opinion of this Court filed this date. Each party is to bear its own costs on appeal.

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*The Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

May 14, 1987

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. WILLIAM J. CAMPBELL, Senior District Judge *

JAMES R. OHSE,	)Appeal from the
	)United States
Plaintiff-Appellant,	)District Court
	)for the Central
No. 85-3074 V.	)District of
	)Illinois.
MICHAEL HUGHES, et al.,	)
	)No. 83-2061
Defendants-Appellees.	)Harold A. Baker, Judge

O R D E R

On consideration of the petition for rehearing filed by the plaintiff-appellant in the above-entitled cause, a majority of the judges on the original panel have voted to deny a rehearing.

Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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*The Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

JAMES R. OHSE,

Plaintiff,

V.

MICHAEL HUGHES, et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 83-2061

(_) Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(X) Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff's motion for summary judgment be, and hereby is, denied.

IT IS FURTHER ORDERED that each defendant's motion for summary judg-

ment on the federal claims Counts I, II, III, IV, and V, be, and hereby are, allowed.

IT IS FURTHER ORDERED that the remaining state claims be, and hereby are, dismissed without prejudice.

IT IS FURTHER ORDERED that the plaintiff's motion for reconsideration of Order of the court, September 22, 1983, be, and hereby is allowed. The Order is vacated insofar as the count is dismissed on its merits; and Count XI is ordered dismissed without prejudice.

September 26, 1985 — Date
John M. Waters — Clerk

/s/ Mary C. Burmeister
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

JAMES R. OHSE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 83-2061
	)	
MICHAEL HUGHES, et al	)	
	)	
Defendants.	)	

ORDER

In this action the plaintiff claims that his suspension and the subsequent termination of his employment as a probation officer violated his rights under the United States Constitution, the Illinois Constitution, and the laws of Illinois, The plaintiff has filed a thirteen-count complaint. Five counts are based on violations of his rights under the United States Constitution. In addition, the plaintiff has included five counts based on violations of the plaintiff's rights under the Illinois

Constitution. The plaintiff has also included three counts based on violations of his rights under Illinois statutory and common law. The common law tort of retaliatory discharge, Count XI, was dismissed by order the court on September 22, 1983. The court has subject matter jurisdiction over the counts arising under the federal constitution pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343. The court exercises pendant jurisdiction over the state law counts based on the same incidents giving rise to the federal claims.

The plaintiff names seven individuals or entities as defendants in this action. Included as defendants are the County of Coles, the County of Cumberland, Michael Hughes, Nancy Owen, William J. Sunderman, Joseph R. Spitz, and Paul C. Komada. The plaintiff and each of the named defendants have moved for summary judgment. Also

pending before the court is a motion by the plaintiff to reconsider the order of September 22, 1983, insofar as it dismisses the plaintiff's retaliatory discharge claim, Count XI.

I. INTRODUCTION

The plaintiff Ohse was hired as a probation officer in December, 1977. The plaintiff and Defendant Hughes, Chief Probation Officer and Ohse's supervisor, had a good working relationship until a point in 1981 when Hughes talked with Ohse about Ohse's personal life involving a marital dispute of a friend of Hughes. Ohse Deposition, pp. 21-23. Also in 1981, Vicki Starwalt was promoted to the position of Deputy Chief Probation Officer and Ohse complained of the selection of Starwalt over himself. Deposition Exhibit #4, p. 26. In April of 1982, Hughes told Ohse about complaints that had been received regarding him. Deposition

Exhibit #4, p. 15. At a meeting in May, 1982, Hughes and Ohse had a confrontation which involved name calling. Id. at p. 14. On June 29, 1982, Ohse and Hughes again had a confrontation. Ohse's Deposition, pp. 87-88.

In July, 1982, Hughes prepared an employee performance evaluation of Ohse. Deposition Exhibit #4, pp. 6-7. On August 11, 1982, Ohse complained to Hughes about the evaluation. Deposition Exhibit #4, p. 8. Hughes prepared and delivered an addendum to the staff performance evaluation. Deposition Exhibit #4, p. 10. On November 23, 1982, Ohse filed a grievance complaining again to Hughes about his evaluation. Deposition Exhibit #4, pp. 11-28. The grievance is a seventeen-page handwritten statement detailing the history of the relationship between Hughes and Ohse over the years.

On December 2, 1982, Hughes responded to Ohse's complaint by stating that he did not think any changes in Ohse's evaluation were merited. Deposition Exhibit #4, p. 30. On December 11, 1982, Ohse wrote to Judge Pearman complaining about Hughes' evaluation and his response to Ohse's grievance. Ohse also made several charges against Hughes. Deposition Exhibit #5. On December 22, 1982, Ohse sent a written memorandum, addressed "To Whom It May Concern," to Pearman, to the defendant judges, to selected County Board members, and to the State's Attorney for Coles County. Deposition Exhibit #6. The memorandum listed five items of concern which Ohse urged merited investigation and possible criminal charges against Hughes. Those items included: (1) use of mileage vouchers to cover the expenses of meals purchased as part of intelligence meetings; (2) the probation officer's use

of sick and vacation days; (3) Hughes' purchase of office supplies out of probation office expenses; (4) Hughes' request for information regarding his father-in-law's personnel file at a local hospital; and (5) Ohse's request for an investigation into other possible violations.

On December 27, 1982, Nancy Owen, State's Attorney for Coles County, sent a letter to Ohse stating that she found "no basis in these allegations on which to file any criminal charges." Deposition Exhibit #7. Hughes then spoke with the defendant Judges Sunderman and Pearman, and with the Administrative Office of the Illinois Courts seeking direction from his superiors on the correct procedures regarding termination. Hughes Deposition, p. 76. On December 28, 1982, Judge Pearman wrote to Ohse, concluding that after reviewing Ohse's materials, he found

that the response by Hughes to Ohse's initial complaint was adequate. Deposition Exhibit #9. Judge Pearman refused to address Ohse's allegations of malfeasance against Hughes. On January 3, 1983, Hughes suspended Ohse by tendering him a notice of suspension. Deposition Exhibit #4, pp. 4-5. Hughes then formally requested Ohse's termination. Deposition Exhibit #4, p. 1.

On January 6, 1983, Judge Pearman appointed Judges Sunderman, Spitz, and Komada to investigate and to proceed with Hughes' request for Ohse's termination. Deposition Exhibit #12. On January 20, 1983, the first hearing was scheduled. The hearing was continued by request of Ohse's counsel. Administrative Transcript, 1/20/83. On February 1, 1983, the second hearing was held. Administrative Transcript, 2/1/85.

Several motions were filed by Ohse's counsel at these hearings. Deposition Exhibits #10 and 11. On February 2, 1983, the judges issued their written decision terminating Ohse as probation officer. Deposition Exhibit #14. On March 16, 1983, Ohse filed his complaint.

II. MOTIONS FOR SUMMARY JUDGMENT

The plaintiff's motion requests judgment on all of his claims. The twelve surviving counts can be broken down into five groups: (1) the plaintiff's claims that his suspension and subsequent termination were accomplished in violation of his Fourteenth Amendment procedural and substantive due process rights; (2) the plaintiff's claims that his discharge was accomplished in violation of his First Amendment rights; (3) the plaintiff's claims that he was discharged in violation

of his Fourteenth Amendment rights to equal protection; and (5) the plaintiff's claims under the Illinois Constitution, the contract law, and statutes of Illinois.

A. Plaintiff's Due Process Claims

The plaintiff, James R. Ohse, claims that he was deprived of both a property and a liberty interest when he was suspended and then terminated as a Coles Cumberland Probation District Probation Officer. Counts I, and III allege that the plaintiff's property interests were taken without due process of law. Count V includes allegations that the plaintiff's liberty interests were taken without due process of law. The court finds that neither a property nor a liberty interest was implicated in Ohse's suspension and subsequent termination.

The determining issue in Ohse's claims is whether a liberty or a property

interest sufficient to invoke the protection of the Fourteen Amendment has been implicated. In Board of Regents v. Roth, 408 U.S. 564 (1972), the Supreme Court clarified what constituted property interests warranting the protection of the Fourteenth Amendment. The court stated that to have a property interest one must look to "rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 408 U.S. 564, 577. State law controls whether a property interest in employment exists for purposes of protection under the Fourteenth Amendment. Bishop v. Wood, 426 U.S. 341, 344 n.7 (1976). The claim can also be based on understandings or de facto systems. Perry v. Sinderman, 408 U.S. 593 (1972). However, the plaintiff must have more than a unilateral expectation in securing benefits.

The plaintiff grounds his claim to a property interest on language in the Illinois statute which authorizes the creation of the probation officers' position and which sets forth guidelines for terminations. Ill. Rev. Stat. ch. 38, Para. 204-5.[1] Ohse claims that the language "as/interest of justice and the good of the probation service may require" is the equivalent of a "for cause" condition on termination which the Supreme Court has recognized creates a property interest in continued employment. Logan v. Zimmerman Brush Company, 455 U.S. 422, 430 (1982); Arnett v. Kennedy, 416 U.S. 134, 166-67 (1974). The court is persuaded that this language is insufficient to create a property interest in the plaintiff's continued employment as a probation officer. The cited language must be read in connection with the language in Paragraph 204-1[2] of the same

Chapter which states that probation officers are removable in the discretion of the court. Furthermore, the court is compelled to reject plaintiff's argument in light of the holding in a case that plaintiff chose to ignore in his several briefs on this topic. Zurek v. Hasten, 550 F.Supp. 125 (N.D. Ill. 1982).

The Illinois Personnel Code, Ill. Rev. Stat. ch. 127, §63b 101-119, provides protections to Illinois employees not exempted from its coverage. This statutory provision requires that discharge of an employee be only for cause and only after notice and prior hearing. Ill. Rev. Stat. ch. 127, § 63b108b.16. Employees covered by this code enjoy a property interest in their continued employment by reason of the "for cause" condition on termination. Zurek, 550 F.Supp. at 126 n.6. However, the Illinois Personnel Code, Ill. Rev. Stat. ch. 127,

§63b104a&c[3] exempts from its protections state employees who are "[j]udges and officers and employees of the courts and notaries public." The plaintiff is certainly an officer of the court. The statute creating the position of probation officer specifies: "[p]robation officers shall serve as such from the date of their appointment, shall be subject to the orders of the courts appointing them, and removable in discretion thereof by the order entered of record." Ill. Rev. Stat. ch. 38, Para. 204-1 (1983). Thus, the plaintiff's position is exempt from the requirements of the code. The Zurek court ruled that a plaintiff who was similarly exempted from the "for cause" limitation of the Illinois Personnel Code had no property interest in his continued employment. The statutory exemption indicates the Illinois legislature's

intention that the exempted positions should not give rise to a "legitimate claim of entitlement." See also Levin v. Civil Service Commission, 52 Ill.2d 516 (1972) (Illinois public employees hold their offices at the pleasure of the appointing power and are removable at any time unless the statute creates a fixed term of office or the position is otherwise protected by statute). Furthermore, the Indiana decision involving a probation officer, Blackwell v. Cook, 570 F.Supp. 474 (N.D. Ind. 1983), supports this court's interpretation of statutory language which leaves continued employment in the discretion of the court.

The plaintiff has also alleged that the Coles Cumberland Probation District manual creates a property interest in his continued employment as a probation officer. The only language in the manual which is pertinent to termination adds

nothing to the language of the statute, and certainly does not suggest a de facto system of tenure. The pertinent language is as follows:

> The CPO has the authority to suspend any probation officer of the department for up to a period of thirty days without pay for disciplinary purposes. In the case of suspension for the purpose of termination, the CPO must file charges with the Chief Judge against the suspended officer. The court may request a hearing to determine the proper course of action or the court may terminate said Probation Officer as requested by the CPO.

Coles Cumberland Probation District Manual, Defendant Judge's Exhibit 1-B-5. Also, there is no evidence that any custom or contract existed which created an expectation of continued employment. Even the plaintiff admits that no such expectation existed. Ohse Deposition, pp. 50-51.

Plaintiff alleges in Count V that he suffered a deprivation of his "liberty

interest" in his reputation and good name. However, at no place in the several briefs filed by plaintiff in support of his motion for summary judgment has this claim been addressed. Defendants, on the other hand, have moved for summary judgment and filed briefs on this question. Defendants' Motion for Summary Judgment, pp. 15-16. Judgment is granted to defendants on Count V for the following reasons.

There are two distinct liberty interests which may have been involved in plaintiff's suspension and termination. Board of Regents v. Roth, 408 U.S. 564 (1972). First, notice and a hearing are required "[w]here a person's good name, reputation and honor are at stake. Id. at 573, citing Wisconsin v. Constantineau, 400 U.S. 433, 437. Secondly, due process may be required if

the state imposed on Ohse "a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." Id. Since plaintiff's complaint fails to allege any foreclosure on his freedom to take advantage of other employment opportunities, the court will address only his claim for deprivation of the first liberty interest.

In Paul v. Davis, 424 U.S. 693 (1976), the Supreme Court held that the infliction by the state of damage to one's reputation without more does not infringe upon a constitutionally protected liberty interest. The damage to reputation must occur in the course of the termination of employment, and the charges involved must involve dishonesty or immorality on the part of the plaintiff. 424 U.S. 693, 710. Plaintiff's Deposition Exhibit No. 2 is a

copy of the statement of the charges presented to him prior to and at his termination hearing. The charges against the plaintiff amount to acts of hostility, arrogance, insubordination, and disruption. These charges fail to trigger the protections of procedural due process. The Seventh Circuit stated in Lipp v. Board of Education of the City of Chicago, 470 F.2d 802 (7th Cir. 1972), that "not every remark which may arguably affect one's reputation violates due process if made by a government official without a hearing, for the Fourteenth Amendment protects only against charges that 'might seriously damage [one's] standing and associations in his community.'" Id. at 805, quoting Board of Regents v. Roth, 408 U.S. 564, 573. In Adams v. Walker, 492 F.2d 1003 (7th Cir. 1974), the Court of Appeals stated that "an unelaborated charge of 'incompetence, neglect of duty

and malfeasance of office' is of a different order of magnitude than charges of dishonesty, immorality, disloyalty, communism, subversive activities, alcoholism or narcotics violations." Id. at 1008-09. In Page v. Harris, 584 F.2d 178 (7th Cir. 1978), the Seventh Circuit stated that "charges of inadequate performance in the area of 'Technical Expertise and Poor Judgment' and 'Supervisory Performance' and the alleged facts behind the charges, do not rise to the level of 'degrading' and 'unsavory' charges which would expose him to public embarrassment and ridicule.'" Id. at 184, (quoting Wisconsin v. Constantineau, 400 U.S. 433, 436-37 (1971)). The court fails to find any facts which would trigger procedural due process protections.

Plaintiff has also moved for summary judgment on his claim that his substantive due process rights were violated by the

manner in which he was terminated. Substantive due process requires that the ultimate deprivation of a property, regardless of the procedure employed, not be arbitrary or capricious. Paige v. Harris, 584 F.2d 178, 184 (7th Cir. 1978). The threshhold question before the court in evaluating plaintiff's claim is to determine whether a right to substantive due process exists in the absence of a protected property interest. The Seventh Circuit addressed this question at length in Jeffries v. Turkey Run Consolidated School District, 492 F.2d 1 (7th Cir. 1974). The Jeffries court concluded that "certainly the constitutional right to 'substantive' due process is no greater than the right to procedural due process." Id. at 4. The Court held the plaintiff had no substantive due process claim in the absence of a showing that a property or liberty interest was involved in her

claim. Accord, Webster v. Redmond, 599 F.2d 793, 801 (7th Cir. 1979); Eichman v. Indiana State University v. Board of Trustees, 597 F.2d 1105, 1109 (7th Cir. 1979); Miller v. School District No. 167, Cook County, Illinois, 495 F.2d 658, 660 (7th Cir. 1974). Accordingly, the court concludes that judgment should be granted for the defendants on Counts I and III.

B. Plaintiff's First Amendment Claim

Plaintiff alleges in Count II that he was suspended and then terminated from his employment in violation of the First Amendment. The plaintiff claims that he was discharged because he distributed a memorandum to the judges in charge of the probation department charging Mr. Hughes with criminal conduct in the administration of the probation office. The complaint alleges that the contents of the written memorandum was speech protected by the First Amendment. The defendants

answer that the plaintiff was discharged due to office friction, deteriorating relations with his superior, and conduct disruptive of the office.

In evaluating the validity of a First Amendment claim, the court must first determine whether the conduct or the speech in question is constitutionally protected. A two-step analysis is prescribed by the Supreme Court in Connick v. Myers, 461 U.S. 138 (1983). First, the court must decide whether the questioned speech is a matter of public concern. Connick, 461 U.S. at 146. Second, the court must make the analysis specified in Pickering v. Board of Education, 391 U.S. 563 (1968). In Pickering, the Supreme Court noted that a public employee's right to speak on an issue of public concern is to be balanced against the state's interest as an employer in promoting the efficiency of the public

service it performs. Id. at 568. In balancing the competing interests, the court shall look to several factors to determine whether an employee's speech may furnish the basis for dismissal from public employment. These factors include: (1) whether the speech was directed towards anyone with whom the employee had daily contacts; (2) whether the speech affected the harmony among the coworkers or the maintenance of discipline by the immediate superiors; and (3) whether the employment relationship between the employee and his supervisors required a personal loyalty and confidence for the proper functioning of the office. The Court ruled that if the balance weighed in favor of the employee's rights to free speech and there was no proof of false statements knowingly or recklessly made by the employee, the exercise of the right to speak on issues of public importance could

not furnish the basis for dismissal from public employment. Pickering, 391 U.S. at 574.

Inquiry into the protected status of speech is one of law and not of fact. Connick, 461 U.S. at 148 n.7. However, the majority in Connick stressed the importance of looking to the "content, form, and context of a given statement, as revealed by the whole record," to determine whether an employee's speech was a matter of public concern. 391 U.S. at 147-148. This court is guided in this task by a recent Seventh Circuit decision which involved First Amendment claims by a public employee. Knapp v. Whitaker, 757 F.2d 827 (7th Cir. 1985). During the first step in the analysis, the Seventh Circuit ruled in Knapp that a teacher's speech regarding mileage allowances was an issue of public concern. In that case, the plaintiff communicated to the school

board his concerns about his supervisor's denial of his request for mileage funds for his and other coaches' work-related travel in the school district. The Court ruled that because his speech involved the use of public funds, such speech was a matter of public concern.

A review of plaintiff's memorandum written and sent to the judges and County Board members reveals a complaint similar to the one in Knapp. Deposition Exhibit #6. Item No. 1 on Page 1 of the memorandum, states in detail instances when Michael Hughes, plaintiff's supervisor, ordered the plaintiff and other probation officers to list meal charges as mileage to entitle those officers to reimbursement. Item No. 2 recounts incidences when Michael Hughes was allegedly claiming vacation and sick days inappropriately and thereby wasting public money as well. Item No. 3 recounts

situations where Michael Hughes allegedly used public monies inappropriately, e.g., the purchase of chairs and a desk. Items 4 and 5, however, can be characterized as allegations of Michael Hughes' abuse of his authority as a supervisor and disagreements about the wisdom of certain orders made by him.

The plaintiff's complaints were not clearly false nor recklessly made. On December 27, 1982, Nancy Owen, State's Attorney for Coles County in Charleston, Illinois, sent the plaintiff a letter stating that an investigation had been made of his complaints and that she "found no basis in these allegations on which to file any criminal charges." Hughes later admitted when he was deposed that the allegations plaintiff had made were in part true. Hughes' Deposition, p. 19, 38-45.

The court concludes that the allegations by plaintiff which involve the misuse of public monies are matters of public concern, and that there is no showing that these statements were false or recklessly made. The court must then move to the second step of the analysis required in Connick, the Pickering balancing test. The court must weigh the plaintiff's rights as a citizen, to discuss matters of public concern against the probation office's need to avoid disruption in its operations. The key question is whether the speech interfered with the employee's work or with the efficient and successful operation of the office. Knapp, 757 F.2d at 842. The factors to weigh against plaintiff's right to speak out are whether the speech was directed against anyone with whom the employee had daily contacts; whether the speech affected the harmony among the

co-workers or the maintenance of discipline by the immediate supervisors; and whether the employment relationship required a personal loyalty and confidence for the proper functioning of the office. Pickering, 391 U.S. at 569-70. This is a difficult question.

Atcherson v. Siebenmann, 458 F. Supp 526, aff'd in part, rev'd in part on other grounds 605 F.2d 1058 (8th Cir. 1979) (S.D. Iowa 1978), has similar facts. In that case a probation officer, in response to accusations regarding her honesty, sent a personal letter to a state's attorney, implying that it was the practice of other probation officers to translate personal expenses into mileage charges to the state. These allegations eventually lead to a meeting between the probation officer and her supervisor in which termination was discussed. The probation officer resigned and brought suit alleging a

violation of her First Amendment rights. The Atcherson court employed the Pickering balancing test, and concluded that there was a strong public interest in knowing the flaws in the operation of public services and applauded the probation officer's choice of forum. The court noted that the letter was a personal letter, not a letter to the editor, a television interview or the like. By using a private forum, Atcherson did nothing to cause damage to the public view of the probation office. The court noted that the disharmony which was caused by the letter only contributed to an already unhappy relationship. It noted that discipline was maintained nonetheless; and remarkably, the officer performed her job well in spite of it.

Atcherson was decided before the Supreme Court issued its decision in Connick, 461 U.S. 138 (1983). Connick

involves similar issues, but the decision presents an analysis of the Pickering factors which results in a conclusion opposite to the one reached by the court in Atcherson.

Sheila Myers, the Plaintiff in Connick, was employed as an Assistant District Attorney in New Orleans. She served under Harry Connick, the District Attorney, for over five years. During her employment, Myers was considered a competent employee.

Myers was terminated from her position as Assistant District Attorney after she circulated a questionnaire to her fellow assistants regarding the office transfer policy and other work-related concerns. The other concerns included a question regarding pressure within the office to work in political campaigns. Connick discovered the circulating questionnaire and immediately terminated Myers because of her refusal to accept a transfer and

because her distribution of the questionnaire was considered an act of insubordination. Myers filed suit under 42 U.S.C. § 1983 alleging that her discharge was in retaliation for exercising her First Amendment rights to free speech.

The Supreme Court ruled that Myers was not discharged in violation of her First Amendment rights. The Court concluded the discharge was constitutionally proper, despite a finding that Myer's speech contained matters of public concern. The discharge was not in violation of Myer's First Amendment rights because, in the balance mandated by Pickering, her right to speak was outweighed by the disruption it caused. 461 U.S. at 154.

The analysis pursued by the Connick court stressed the public employer's needs to promote efficiency and integrity in the discharge of official duties and to

maintain proper discipline. Id. at 151-152. The Court found that Myer's questionnaire did not impede her ability to perform her duties; however, the questioning did undermine a close working relationship between the Assistants and their superiors. Id. In sum, the Court found that it was not necessary for "an employer to allow events to unfold to the extent that the disruption of the office and the destruction of the working relationships is manifest before taking action." Id. Additionally, the Court focused on the time, place, manner, and context of Myer's speech before ruling it was outweighed by the concerns of her employer. The Court concluded its decision by characterizing Myer's suit as an attempt to "constitutionalize" her employee grievance. 461 U.S. at 154.

An application of the Atcherson and Connick analysis to Ohse's claims points

to the conclusion that Ohse's speech is not constitutionally protected. The content of the written communications with Hughes which raised public concerns must be scrutinized in light of the whole record. The correspondence with Hughes, the judges and the County Board reveals a litany of complaints regarding personnel problems taking place over a matter of years. The only accusations which rise to the level of public concern are the inappropriate mileage charges and other possible misuse of county materials and time. Deposition Exhibit #4. The improper mileage charges were exposed and the practice ended by Hughes several months prior to Ohse's letter to the judges. Deposition Exhibit #1. When put into the context of the chronology of events beginning in 1981, the charges against Hughes are revealed as an extension of Ohse's grievance about his

evaluation, and possibly his unhappiness at Vicki Starwalt's promotion.

In light of the context in which these charges were raised, it is impossible to avoid the conclusion that Ohse has tried to "constitutionalize" his grievances about his evaluation and Vicki Starwalt's promotion. The court finds that Hughes did not have to allow "events to unfold to the extent that the disruption of the office and the destruction of the working relationships is manifest before taking action." Connick, 461 U.S. at 154. Therefore, judgment for the defendants is appropriate on Count II.

C. Plaintiff's Equal Protection Claim

Plaintiff also claims that he was denied equal protection of the law in his suspension and termination. Plaintiff's equal protection claim rests on the fact that he was treated differently from other public employees. Plaintiff's allegations

in paragraph 34c state that plaintiff was not afforded the same procedure afforded other employees of local units of government of the State of Illinois similarly situated. Plaintiff argues that police officers, firemen, teachers, and state employees are all assured trial-type, evidentiary hearings before being discharged for cause. He argues that there is simply no valid distinction to be drawn between police offices, firemen, state employees, university employees, and school teachers on the one hand and probation officers on the other.

Equal protection requires that any distinction between probation officers and other employees of the State of Illinois must be supported by a rational relationship to a legitimate state purpose in order to withstand constitutional challenge. This rational relationship standard has traditionally been an easy

one to meet. The court finds in this situation that the differences in the procedures afforded the probation officers during suspension and termination is rationally related to a legitimate purpose of the state. Probation officers are different from other types of public employees because they serve as officers of the court and enjoy special positions of trust and confidence with the court. Because of this position, probation officers serve at the discretion of the court and may be discharged for less than "cause." See e.g. Eichman v. Indiana State University Board of Trustees, 597 F. 2d 1104 (7th Cir. 1979); Pruitt v. Kimbrough, 536 F. Supp. 764, 768 (N.D. Ind. 1982). Thus, summary judgment for the defendants is appropriate on Count IV.

D. Plaintiff's State Claims under the Illinois Constitution, Contract Law and Statutes

The plaintiff's pendant state claims are dismissed without prejudice because of the disposition of his federal claims. Where federal claims are dismissed before trial, the state claims should be dismissed as well. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); Benson v. Cady, 761 F.2d 335 (7th Cir. 1985).

In light of the dismissal of the plaintiff's remaining state claims, the court vacates its Order of September 22, 1983, insofar as it dismisses the plaintiff's retaliatory discharge claim and, instead, dismisses it without prejudice.

IT IS THEREFORE ORDERED that the plaintiff's motion for summary judgment be, and hereby is, denied.

IT IS FURTHER ORDERED that each defendant's motion for summary judgment on the federal claims Counts I, II, III, IV, and V be, and hereby are, allowed.

IT IS FURTHER ORDERED that the remaining state claims be, and hereby are, dismissed without prejudice.

IT IS FURTHER ORDERED that the plaintiff's motion for reconsideration of Order of the court, September 22, 1983, be, and hereby is allowed. The Order is vacated insofar as the count is dismissed on its merits; and, Count XI is ordered dismissed without prejudice.

The Clerk is directed to enter judgments accordingly.

ENTER this 26th day of September, 1985.

HAROLD A. BAKER
Chief U.S. District
Judge

FOOTNOTES

1

Any chief probation officer shall have authority to suspend any probation officer under his supervision for a period of not exceeding thirty days, but may not discharge, and it shall be the duty of such chief probation officer promptly to file charges against any probation officer so suspended by him, with the court or judges appointing such probation officer, and said court or judges shall thereupon investigate said charges and may hear eidence, and shall act thereon, as the interest of justice and the good of the probation service may require.

Ill. Rev. Stat., ch. 38, Para. 204-5 (1983) (emphasis added).

2

The circuit court of each of the several counties in this State may appoint a probation officer to act as such for and throughout the county to which he shall be appointed. The circuit court of any county may appoint such number of additional probation officers for such county as the court may deem to be necessary or advisable. Any circuit court may also, in its discretion, appoint a chief probation officer, deputy chief probation officers, and supervisors, in addition to the number of probation officers appointed. The Circuit Judges in any of the circuits in this State, except the judicial circuit of the County of Cook, may, in their discretion, in lieu of appointing a probation officer for each or

any county in such circuit, appoint a probation officer to act for and throughout the circuit in which he may be appointed, or establish a probation district of 2 or more counties within the circuit, if such district would have a population of not less than 25,000 nor more than 100,000 inhabitants as determined by the school census preceding the establishment of such district, and appoint, immediately after such establishment, a probation officer and such number of additional probation officers for such circuit as the Circuit Judges may deem to be necessary or advisable, one of whom shall be the chief, to act for and throughout such district. Probation officers shall be of good character, shall possess such other qualifications as may be provided by rules to be adopted by such courts respectively, and may by such rules each be required to give bond in a sum not exceeding $5,000, conditioned for the faithful discharge of the duties of such probation officer, and otherwise as provided by the rules such bond to be with such sureties as may be approved by the court. The probation officers shall serve as such from the date of their appointment, shall be subject to the orders of the courts appointing them, and removable in the discretion thereof by an order duly entered of record. The circuit court may adopt general rules not inconsistent with the provisions of this Act, and promotive of its letter and spirit, providing, among other things for the qualifications of probation officers,

their duties, and such other matters as may seem expedient.

Ill. Rev. Stat. ch. 38, Para. 204-1 (1983) (emphasis added).

3

§ 4a. Definition of jurisdictions. There are hereby created three separate areas of personnel jurisdiction of the Department of Central Management Services, as follows:

(1) Jurisdiction A, with respect to the classification and compensation of positions in the State service.

(2) Jurisdiction B, with respect to the positions in the State service to which persons must hold appointments on a basis of merit and fitness.

(3) Jurisdiction C, with respect to conditions of employment in State service. Ill. Rev. Stat. ch. 127, § 63b104a.

§ 4c. General exemptions. The following positions in State service shall be exempt from jurisdictions A, B, and C, unless such jurisdictions shall be extended as provided in this Act:

....

(3) Judges and officers and employees of the courts, and notaries public.

Ill. Rev. Stat. ch. 127, § 63B104c.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

JAMES R. OHSE,	)	Filed
	)	Oct. 28, 1985
Plaintiff,	)	
	)	
vs.	)	No. 83-2061
	)	
MICHAEL HUGHES, et al.,	)	
	)	
Defendants.	)	

ORDER

This case is before the court on the plaintiff's motion to alter judgment. Plaintiff asserts that the court erred in all of its findings, and in particular, incorrectly ruled that plaintiff did not have a property interest in his position as a probation officer. Only the latter point merits a response. The following is an elaboration upon the reasons for the court's findings as set forth in the order of September 26, 1985. The motion to alter judgment

is denied.

Plaintiff, as an alternative, first argues that he was not a state employee but a county employee. Then, argues he enjoyed a protected property interest in his employment as a probation officer by citing language which applies only to state employees. The plaintiff, for the first time in this litigation cites Article VI, Section 18(b) of the Illinois Constitution as authority for establishing a property interest in his employment. Article VI, Section 18(b) provides as follows:

> (b) The General Assembly shall provide by law for the election, or for the appointment by the circuit judges, of clerks and other non-judicial officers of the circuit courts and for their terms of office and removal for cause.

The plaintiff argues that the "removal for cause" language of this section creates a property interest in his

former position as a probation officer for the Cumberland Coles County Probation District. The plaintiff's reliance on this language is misplaced.

Probation officers are non-judicial officers of the state subject to the provisions of Article VI, Section 18. People ex rel. Bier v. Scholz, 77 Ill.2d 12 (1979). The Illinois Supreme Court in the Bier case ruled that an Illinois statute passed pursuant to Article VI, Section 18(c)[1] properly delegated to the County Board the authority to set probation officers' salaries. In a later case, the Illinois Supreme Court stated emphatically that the non-judicial officers of the court described in Article VI, Section 18 of the Illinois Constitution are officers of

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[1]Section 18(c) states as follows: "The salaries of clerks and other non-judicial officers shall be as provided by law."

the judicial branch of the state. They are not officers of the county government. Drury v. County of McLean, 89 Ill.2d 417, 420 (1982). The court ruled that, for the purposes of Article VI, Section 18(b), the clerk of the circuit court was a member of the judicial branch of state government despite the fact that counties paid his salary and expenses. Id. at 425. Accordingly, probation officers are members of the judicial branch of state government despite the fact that the counties pay a certain portion of probation officers' salaries and the fact that the probation officers participate in the municipal retirement fund. The language in the Illinois Pension Code regarding probation officers' rights to participate in the pension fund is not in conflict with the Drury decision. See

Ill. Rev. Stat. ch. 108 1/2, § 7-109(3).

The "removal for cause" language in Article VI, Secton 18(b) does not create a property interest in the employment position of non-judicial officers of the circuit court. Rather, the language delegates to the Illinois General Assembly the authority to legislate the procedures for the appointment, removal, and the terms of office for non-judicial officers of the circuit courts. The order of September 26, 1985, reviews the Illinois statutes which authorize the creation of the probation officer's position and which set forth guidelines for terminations. Ill. Rev. Stat. ch. 38, Para. 204-1 et seq.

The court concludes that the General Assembly chose to leave removal of a probation officer in the discretion of

the circuit court and to exempt the position from the standards of the Illinois Personnel Code which requires a "for cause" condition on termination. Ill. Rev. Stat. ch. 127, §§ 63(b)104a and c, 63(b)108.b.16. The removal language in Article VI, Section 18(b) does not by itself create a property interest in employment as a probation officer. See Order, October 19, 1984, Klebe v. County of Lake, Illinois, 83-C-6641 (N.D. Ill.).

IT IS THEREFORE ORDERED that the plaintiff's motion to alter judgment be, and hereby is, denied.

ENTER this 28th day of October, 1985.

/s/ Harold A. Baker
HAROLD A. BAKER

Chief U.S. District Judge

U. S. DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

JAMES R. OHSE, Plaintiff, -vs- MICHAEL HUGHES, NANCY OWEN, WILLIAM J. SUNDERMAN, JOSEPH R. SPITZ, PAUL C. KOMADA, COUNTY OF COLES and COUNTY OF CUMBERLAND, Defendants.	)	No. 83-2061

DEPOSITION

The deposition of JAMES R. OHSE, taken by Defendants on May 16, 1984, in the law offices of Dukes, O'Rourke, Stewart, Martin & Helm, Ltd., 146 N. Vermilion, Danville, Illinois, before Jamie Fox, Certified Shorthand Reporter of the State of Illinois, pursuant to stipulation attached hereto.

CSR #842606

Q. Now Mr. Ohse, during the last 90 days that you worked as Probation Officer, there was friction in the Probation Office between you and the other Probation Officers, is that correct, sir?

A. I don't recall any friction between myself and the other Probation Officers, they didn't talk to me.

Q. Let me ask you this, Mr. Ohse. In your opinion, is that a sign of a harmonious smooth running office if the employees do not speak to each other?

A. Well, the reason I believe they didn't talk to me is as a result of Mr. Hughes mentioning to them at a staff meeting we had the 25th of May, 1982, he stated to them that, in front of everyone, that it was when he was changing our policies and procedures.

And Mr. Hughes stated that, in front of everyone and very loudly, that he did not like me, that he did not really want to have to talk to me any more than he ever had to, and he would not blame everyone else at this meeting if they never talked to me or didn't like me either, and from that time on, most of my fellow officers who, prior to that time I have a very good working relationship with, refused to talk to me.

Q. Who was present at that meeting besides yourself and Mr. Hughes?

A. Vickie Starwalt, Steve Kelley, Eric Gaffner, and Pam Stroud.